IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JEFF SCHMIDT, Plaintiff, v. AMERICAN INSTITUTE OF PHYSICS, Defendants.	)	Case No. 04-CV-3774 Judge Alexander Williams

DR. JEFF SCHMIDT'S CONFIDENTIAL MEDIATION STATEMENT

SUBMITTED TO:

HAROLD HIMMELMAN

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***** CONFIDENTIAL AND SUBJECT TO FED. R. EVID. 408 *****

Volume I

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Plaintiff, Dr. Jeff Schmidt ("Plaintiff" or "Dr. Schmidt"), submits this confidential Mediation Statement to introduce mediator Harold Himmelman to the issues in this employment dispute.

I. PROCEDURAL HISTORY AND BACKGROUND FACTS

The Parties to the Mediation. Dr. Jeff Schmidt, a white U.S. Citizen, is the Plaintiff in the present action. Dr. Schmidt began working with AIP in its New York offices in or about March 1981, first as an associate editor and then as a senior editor of AIP's publication, *Physics Today*. Dr. Schmidt moved to the Washington area in October 1993 when AIP moved its headquarters to College Park, Maryland and worked for AIP until his termination, which is the subject of the present action, on May 31, 2000.

The American Institute of Physics ("AIP") is the Defendant. AIP publishes, edits, sells and distributes scientific journals, including the magazine *Physics Today*, for which Dr. Schmidt worked.

The Issues in Dispute. The issues in dispute relate, generally, to the termination of Dr. Schmidt's employment with AIP. Dr. Schmidt alleges, *inter alia*, that Defendant terminated his employment in retaliation for complaining about AIP's discriminatory hiring practices and his open advocacy of equal employment opportunities at AIP. He has brought a six count complaint for: (i) violation of 42 U.S.C. § 1981; (ii); violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*; (iii) violation of 42 U.S.C. § 1983; (iv) breach of contract; (v) detrimental reliance; and (vi) breach of the implied covenant of good faith and fair dealing.

Through his action, Dr. Schmidt seeks redress for AIP's retaliatory actions, including AIP's silencing and ultimate firing of Plaintiff due to his participation in statutorily protected activity, namely attempting to stop AIP's discriminatory hiring practices. On the basis of these violations, Dr. Schmidt seeks reinstatement, back pay, front pay, compensatory damages and punitive damages.

Events Giving Rise to Dr. Schmidt's Action. As a general matter, the most salient facts fall into two categories: (i) the actions taken by Dr. Schmidt to advocate equal employment and to protest AIP's discriminatory practices; and (ii) the retaliatory actions taken by AIP that include, and ultimately resulted in, Dr. Schmidt's termination. The exhibits to this Statement provide documentary support for

AIP's retaliatory actions. Dr. Schmidt also believes that additional support for his claims of retaliation are found in documents that AIP has refused to produce to date. Dr. Schmidt also believes that depositions of key AIP management involved in the conduct alleged, including the decision to terminate Dr. Schmidt, will support his claim of unlawful retaliation.

It is essential to consider Dr. Schmidt's equal employment activity and AIP's consequent and retaliatory conduct to assess the merits of Plaintiff's claims. As stated in Dr. Schmidt's First Amended and Consolidated Complaint ("Complaint" at Exh. 1 of Joint Appendix) and as illustrated in documents produce by the parties to date, Dr. Schmidt's equal employment activity and AIP's retaliatory acts include:[1]

- From 1981, when Dr. Schmidt joined *Physics Today*, until 1995, Dr. Schmidt received above average performance evaluations.[2]

- During his employment, Dr. Schmidt repeatedly voiced equal employment concerns to AIP management. [*see, e.g.,* S000522-523, 00837-839, 000846, 002091-102]. Dr. Schmidt became more vocal about his equal opportunity concerns at AIP in 1996, the same year his performance evaluations were lowered to below above average. That same year, *Physics Today* publisher Charles Harris remarked to Plaintiff that a single dissident can adversely affect an entire workplace.

- On or around March 8, 1996, Mr. Harris commented to Dr. Schmidt that his only reservation regarding raising Dr. Schmidt's job performance level was that Dr. Schmidt's higher rating would add a year to the time it would take to terminate him.

- On October 4, 1996, Dr. Schmidt complained to the *Physics Today* advisory committee about an unjustified salary differential for Jean Kumagai, the only minority professional at AIP. AIP was forced to award Ms. Kumagai a 25% salary increase. AIP management voiced displeasure with Dr. Schmidt's efforts.

- On November 15, 1996, Dr. Schmidt attempted to raise the issue of discriminatory hiring practices at a *Physics Today* retreat by including these issues on a proposed agenda. Dr. Schmidt suggested that AIP implement "affirmative action to increase diversity of *Physics Today* staff." [D00425].

- On November 15, 1996, AIP formalizes in writing "[a]greement that [AIP] wants to keep all the present staff members. Security is a prerequisite of speaking freely, sharing ideas and experimentation." [S000440-445, 0516-517].

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[1] Supporting documents are attached hereto as Exhibits 1A (Plaintiff's production) and 1B (Defendant's production).

[2] Dr. Schmidt's performance evaluations and related documents are attached as Exhibit 2.

- On November 17,1996 Mr. Benka sent an email to AIP personnel stating that "nobody's job will be jeopardized by speaking freely and airing their views on matters pertinent to the magazine." [S000628].

- On November 26 and 27, 1996, Dr. Schmidt successfully pressured AIP into sending a job announcement to minority group organizations. Dr. Schmidt also updated the *Physics Today* staff on the status of equal employment opportunity efforts related to the job opening.

- *Physics Today* publisher Charles Harris communicated to Dr. Schmidt that he was strongly opposed to Plaintiff's activities, which had increased significantly in 1996.

- In April 1997, after AIP had interviewed three white males, Dr. Schmidt argued strongly at a *Physics Today* staff meeting that the promising minority applicants should be interviewed as well. *Physics Today* Publisher Charles Harris and Editor Stephen G. Benka denied Dr. Schmidt's request.

- At a staff retreat on September 25, 1997, *Physics Today* Publisher Charles Harris shouted at Dr. Schmidt to prevent him from asking a question. Mr. Harris ordered Dr. Schmidt to keep quiet. Mr. Harris indicated to Dr. Schmidt that he thought Dr. Schmidt's request at the meeting was an attempt to raise, among other things, diversity issues. [D00306].

- On October 1, 1997, Messrs. Harris and Benka delivered a "gag order" notice to Dr. Schmidt stating that management would no longer tolerate actions it deemed to be "counterproductive." [S001031, 001032, 001033-34, 001518-19]. Ultimately, on December 2, 1997, AIP sent Dr. Schmidt a memorandum titled "rescindment," rescinding the "gag order" that it had placed on him after staff members openly criticized it. [S001523; D00329].

- On October 15, 1997, Mr. Harris circulated a memorandum stating that "continued employment is based on satisfactory performance – the staff should be free to engage in constructive criticism and discussion without fear." [S000630].

- On October 17, 1997, Dr. Schmidt met with the *Physics Today* Advisory Committee and objected to the magazine's discriminatory employment practices. Mr. Harris continuously and harshly criticized Dr. Schmidt for going to the *Physics Today* Advisory Committee. [*See, e.g.*, D01457-458].

- On October 24, 1997, AIP's Executive Director and CEO Marc H. Brodsky accused Dr. Schmidt of leveling an unfounded charge of discrimination regarding *Physics Today's* hiring practices. [S000522-23. 002160-161]. Mr. Brodsky demanded that Dr. Schmidt prove that AIP's hiring practices were discriminatory. On November 5, 1997, in response to Mr. Brodsky's demand, Dr. Schmidt met with Mr. Brodsky and gave him a memorandum that outlined AIP's discriminatory hiring practices. Following his meeting, Dr. Schmidt sent Mr. Brodsky a memorandum suggesting that Mr. Brodsky speak with the only minority group member of the *Physics Today* staff, Jean Kumagai, about discrimination at the magazine. Mr. Brodsky did not do so.

- In 1997, Dr. Schmidt received a rating of "Exceeds Job Requirements," but the following year he received the lower rating of "Meets Job Requirements." Dr. Schmidt received the lower rating even though he had done more work than the previous year. Dr. Schmidt received the lower rating after persistently bringing his concerns about AIP's diversity problem to the attention of AIP management and after being told repeatedly that such actions were disruptive.

- On January 22, 1998, Mr. Harris refused Dr. Schmidt's request for relief from the pressure to take on non-editorial clerical work. Mr. Harris told Dr. Schmidt that his activities in the previous year made him "unsympathetic" to Dr. Schmidt's requests. [*see, e.g.*, D00300].

- On January 28, 1998, after normal working hours, Mr. Benka broke up two private conversations between Dr. Schmidt and coworker Toni Feder. When Dr. Schmidt asked Mr. Benka why he disrupted the conversations, Mr. Benka said that he did not want any activities similar to what had occurred in the previous year. Mr. Benka stated that all private conversations would be subject to monitoring by management. The ban on private conversations appeared to be aimed primarily at Dr. Schmidt and was an attempt to prevent him from criticizing AIP's discriminatory hiring practices. [S00752-755, 00788-791, 001039-41; D00331-332].

- On March 20, 1998, Dr. Schmidt met with Mr. Brodsky and pressed him to conduct the equal opportunity staff training that AIP had told the government it would conduct. Mr. Brodsky told Dr. Schmidt that some of Dr. Schmidt's activities were "counterproductive."

- Notes relating to a meeting, produced by AIP, indicate that "Jeff says that it is AIP policy 'to train all employees in [Affirmative Action] every year. Terri says we train all new employees during orientation. She needs to see that all employees are trained once, then all new ones as they come in, and change the policy's wording." These notes indicate that AIP was aware that it was not following its own policies.

- On March 24, 1998, Dr. Schmidt met with Mr. Benka to discuss his 1998 performance review – for the period of February 1997 to January 1998. This represented the first review after Dr. Schmidt had increased his complaints about AIP's discriminatory hiring practices. Mr. Benka focused on Dr. Schmidt's activities, in particular around the 1996 staff retreat, where Dr. Schmidt drew attention to the lack of diversity at *Physics Today* and raised other issues. Mr. Benka focused on the 1996 events in Dr. Schmidt's 1998 performance review despite the fact that they had occurred nearly a year and a half earlier, before the period covered by the review. Mr. Benka called Dr. Schmidt's activities "disruptive" and made it clear that Dr. Schmidt's actions would not be forgotten, no matter how long ago they occurred. AIP lowered Dr. Schmidt's performance rating from "Exceeds Job Requirements" to "Meets Job Requirements" and instituted what it called "new demands" on Dr. Schmidt, including a 28% increase in his workload. Mr. Benka warned Dr. Schmidt that any "disruptive" actions would not be tolerated in the future.

- On April 27, 1998, Dr. Schmidt appealed his 1998 performance review to AIP's Director of Human Resources, Theresa Braun, and Director of Physics Programs, James H. Stith. Dr. Schmidt noted in his appeal that he received a lower performance rating as punishment for his equal employment activities and not as a result of his work quality. [S000524-580, 002103-159]. On or about April 27, 1998, Dr. Schmidt circulated his appeal memorandum to twelve coworkers.

- On June 25, 1998, Dr. Stith denied Dr. Schmidt's appeal requesting the correction of false statements in his review. Dr. Stith cited Dr. Schmidt's activities as the reason for the denial and as the reason for Dr. Schmidt's lowered rating. Dr. Stith told Dr. Schmidt that when he did things that his supervisors would be happier that he not do, he had to be willing to pay a penalty if it was imposed. [S001192].

- On June 25, 1998, Dr. Schmidt appealed the ban on private conversations to Dr. Stith. Dr. Stith told Dr. Schmidt that he knew about the ban, which was described in Dr. Schmidt's April 27,

1998, performance review appeal. Dr. Schmidt asked Dr. Stith to retract it. Dr. Stith promised to look into it, but he never lifted the ban.

- In mid-June 1999, Mr. Benka criticized him harshly for showing coworkers his 1998 performance review appeal 14 months earlier. Mr. Benka told Dr. Schmidt that he was lucky to still be employed after showing his coworkers the appeal. The biggest section of the appeal focused on the issue of discrimination in employment practices at *Physics Today*. [S000524-580, 002103-159].

- Handwritten notes dated June 18, 1999 reflect AIP's displeasure with Dr. Schmidt's activities and his having circulated his 1998 performance review. Dr. Schmidt's equal employment and efforts to improve diversity were referred to as "unacceptable behavior" and an "orchestrated rebellion." [D00493]

- In 1999, AIP again gave Dr. Schmidt a performance rating lower than "Exceeds Job Requirements." The 1999 review criticized Dr. Schmidt for something he did 16 months earlier: circulate his 1998 performance review appeal, which documented Dr. Schmidt's belief that AIP's hiring practices were discriminatory. It was precisely the document's focus on such issues that bothered Mr. Benka, who told Dr. Schmidt on August 19, 1999, "What was extremely destructive was how much of it had *nothing* to do with the review." [S000767-783]. AIP criticized Dr. Schmidt for circulating that document and said in his 1999 performance review that such action undermined the magazine's "editorial effort" and was "unacceptable." Additionally, the review changed the work accounting method previously employed by AIP and inaccurately claimed that Dr. Schmidt had failed to meet work quantity standards set by AIP.

- Dr. Schmidt subsequently met with Mr. Benka to discuss his 1999 performance review. Mr. Benka refused to make any changes and told Dr. Schmidt to "contribute productively, constructively and positively to the mission of the magazine." [S001529].

- On or around November 9, 1999, Dr. Schmidt requested permission to either use his accumulated vacation time or carry it over to the year 2000. AIP management failed to respond to Dr. Schmidt's request until a month later, which did not leave him enough time to use the vacation hours. This forced Dr. Schmidt to forfeit vacation time that he had earned. AIP's actions were retaliatory against Dr. Schmidt, as evidenced by the fact that Dr. Schmidt's coworker Paul Elliott, who suffered the same lack of response to his vacation carry-over request, was permitted to carry over all of his unused vacation time.

- On April 5, 2000, Dr. Schmidt met with Mr. Benka and Mr. Nanna to discuss the vacation carry-over problem. Mr. Nanna admitted that AIP had made a mistake, but he refused to take corrective action for Dr. Schmidt. [S001188-189].

- By May 31, 2000, Dr. Schmidt had completed his entire annual review period work quota in the first ten months of the period. [*See, e.g.,* D0053]. On that same day, *Physics Today* fired Dr. Schmidt, supposedly for writing some of *Disciplined Minds* at the office. AIP cited the book's opening line about "stolen time" as the reason for the termination. The quoted passage relied on by AIP is literary hyperbole and a literary nod to the book titled *Steal This Book.*

- Significantly, other employees wrote non-AIP or freelance articles (which were submitted in connection with an investigation of AIP's termination of Dr. Schmidt) while working at AIP and used

AIP resources, including facsimile and photocopy machines with the knowledge of AIP management and staff. [S581-582, 631-640, 848-863, 885-894 attached hereto as Exh. 3].

- Throughout Dr. Schmidt's tenure at AIP, AIP management, colleagues and authors who submitted articles for publication praised Dr. Schmidt's high quality of work. *See* Exh. 4.

II. DR. SCHMIDT'S CLAIMS; GOVERNING LAW

A. 42 U.S.C. § 1981.

In his Section 1981 claim, Dr. Schmidt alleges that the conduct engaged in by the Defendants (as outlined above) constitutes retaliation against Dr. Schmidt for advocating equal employment and protesting AIP's discriminatory practices that denied minority group members the right to make and enforce contracts and enjoy the full and equal benefit of all laws and proceedings for the security of persons as enjoyed by white citizens, in violation of 42 U.S.C. § 1981.

To make a *prima facie* claim of retaliation under § 1981, a plaintiff must show that (1) he engaged in protected activity, (2) he suffered an adverse employment action at the hands of his employer, and (3) the employer took the adverse action against him because of his protected activity. *Ford v. G.E. Lighting, LLC*, 2005 U.S. App. LEXIS 289, at *15-16 (4th Cir. 2005).

Complaining about racial discrimination constitutes a "protected activity" for § 1981 purposes. *See, e.g., id.* at *16. Termination of employment satisfies the "adverse employment action" requirement of the second prong. *Id.* Under the third prong of a retaliation claim, a plaintiff must show that the employer had knowledge of the plaintiff's protected activities in taking the adverse action. *See id.* at *16 (citing *Price v. Thompson*, 380 F.3d 209, 213 (4th Cir. 2004)). In determining the causal link between the plaintiff's protected activity and an adverse action, courts may also consider circumstantial evidence, such as the time period between the employee's protected activity and the employer's adverse employment actions. *See, e.g, id.* at *17.

If a plaintiff can successfully establish a prima facie case of retaliation, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for its actions. *See Ford,* 2005 U.S. App. LEXIS 289, at *18-19. In turn, if the employer can successfully meet its burden in articulating a non-retaliatory reason for its adverse action, the burden shifts back to the plaintiff who must then show

that the employer's proffered reason for its decisions was pretextual and that retaliation was the actual reason for its adverse employment actions. *See id.* at *11. The Supreme Court has identified several factors appropriate to a consideration of pretext: the strength of the plaintiff's *prima facie* case, probative evidence that the employer's explanation is false, and any other evidence from which a "rational factfinder could conclude" there was retaliation. *See id.* at *19-20 (citing *Reeves v. Sanderson Plumbing Prods, Inc.*, 530 U.S. 133, 148-49 (2000)).

B. Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq*).

The elements of Dr. Schmidt's Section 1981 claim are essentially the same as those required to make out a claim under Title VII. Like his Section 1981, Dr. Schmidt's Title VII claim alleges that Defendants unlawfully retaliated against Dr. Schmidt for advocating equal employment and protesting AIP's discriminatory employment practices.

To make a claim for Title VII retaliation, a plaintiff must show: (1) that he engaged in protected activity; (2) that his employer took a material adverse employment action against him; and (3) that a causal connection existed between the protected activity and the adverse action. *Price v. Thompson*, 380 F.3d 209, 211 (4th Cir. 2004).

Retaliation may be proved either via direct evidence or, where a plaintiff must rely on circumstantial evidence, by the burden shifting scheme of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Id.* at 212. In the burden shifting *McDonnell Douglas* context, the third, causal connection, prong of a retaliation claim may be proved with circumstantial or direct evidence. *See Peters v. Jenney*, 327 F.3d 307, 320 n.15 (4th Cir. 2003). *See also Price,* 380 F.3d 213.

In the *McDonnell Douglas* framework, after a plaintiff establishes a *prima facie* case of retaliation, the burden shifts to the employer to establish a legitimate non-retaliatory reason for the action. *Price,* 380 F.3d at 212. If the employer sets forth a legitimate, non-retaliatory explanation for the action, the plaintiff then must show that the employer's proffered reasons are pretextual in order to succeed on the retaliation claim. *Id.* A plaintiff can prove pretext by showing that the "explanation is 'unworthy of credence' or by offering other forms of circumstantial evidence sufficiently probative of

[retaliation]." *Id.* The Fourth Circuit has stated that a plaintiff's burden of showing pretext may be based on "the strength of the prima facie evidence in creating an inference of discrimination" and "probative evidence 'that the employer's explanation is false.'" *See id.* at 214 (citations omitted).

C. 42 U.S.C. 1983

A cognizable § 1983 claim requires the plaintiff to allege (1) deprivation of a cognizable constitutional right (2) by a state official (3) acting "under color of law." *See Jenkins v. Government of the District of Columbia*, 1996 WL 440551 (DC Cir. 1996). Cognizable constitutional rights are located in one of four places: (1) the Bill of Rights (through Fourteenth Amendment incorporation); (2) rights recognized by substantive due process jurisprudence; (3) the Fourteenth Amendment and Fifth Amendment right to procedural due process; or (4) federal law.

Although a procedural due process claim is untenable if plaintiff's employment is at will, Dr. Schmidt has alleged that his employment status was modified from "at will" to contractual. Complaint, ¶¶ 57-64. As Dr. Schmidt believes that the evidence will establish the creation of a contractual employment relationship, a procedural due process claim under § 1983 is viable. *See Gardiner v. Tschechtelin*, 765 F. Supp. 279, 285 (D. Md. 1991); *see also*, *Goetz v. Windsor Central School District*, 698 F.2d 606, 608-09 (2d Cir. 1983).[3]

Executive officials of both *public entities* and *private entities performing public functions* are liable under § 1983. *See Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001). The Supreme Court has established a test for determining when a private entity is sufficiently public to trigger liability under § 1983. In *Brentwood Academy v. Tennessee Secondary School Athletic Association*, the Supreme Court established a fact-intensive, cumulative test for determining state action: "entwinement." The formal legal designation is not dispositive. Rather, a court must ask how the private entity functions. "The character of a legal entity is determined neither by

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[3] *Goetz v. Windsor Central School District* (holding that "at will employees possess no protectable property interest in continued employment," but that a contractual requirement of dismissal for cause does give rise to a property interest in continued employment); *Perry v. Sindermann*, 408 U.S. 593 (1972) (holding a "de facto tenure system" in place at the university gave rise to a property interest in continued employment sufficient to trigger Fourteenth Amendment due process).

its expressly private characterization in statutory law, nor by the failure of the law to acknowledge the entity's inseparability from recognized government officials or agencies." *Brentwood* at 298.

The fact-intensive "entwinement" test contains a "close nexus" requirement: "[S]tate action may be found if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Brentwood* at 295. The *Brentwood* Court elaborates: "When the relevant facts show pervasive entwinement to the point of largely overlapping identity between an ostensibly private organization and a governmental entity, the implication of state action is not affected by pointing out that the facts might not loom large under a different test." *Brentwood* at 303.

The Informal Affiliation Agreement (IAA) between the University of Maryland at College Park ("UMCP") and AIP provides some evidence of AIP's entwinement with a state institution. *See* IAA at Exh. 5. In drafting the IAA, several University of Maryland staff were involved, including the Dean of the College of Computer, Mathematical, and Physical Sciences, Associate Vice President of Student Affairs, Assistant to the President of UMCP, and members of the Physics Department staff. *See* IAA §1 ¶ 4. The IAA states as a "premise" the intent to "...shar[e] resources and expertise..." IAA § 0 ¶ 1. The IAA goes on to express a goal of achieving "synergy" between the two organizations, stating that the "prospect of synergy" was a motivating factor in AIP's decision to locate in Maryland. IAA, § 0 ¶ 1.

The IAA goes on to elaborate upon two-way resource-sharing between AIP and UMCP. The IAA also likens AIP staff to "full time staff at UMCP." IAA §2 ¶ a. AIP physicists may also assume "adjunct or visiting faculty status at the Physics Department." IAA § 2 ¶ b. Specific services provided by AIP to UMCP include: (a) access to AIP's library, borrowing privileges, and employment opportunities for UMCP students; (b) student internships and faculty fellowships; (c) AIP publication and information distribution to interested faculty; (d) free access to the database and services of AIP; (e) use of AIP conference facility. IAA § 3 ¶ a-e. UMCP services provided to AIP include: (a) temporary staff id cards; (b) adjunct/visiting faculty positions; (c) University publications; (d) UMCP computing facilities; (e) University and departmental lectures and colloquia; and (f) "extension of the university shuttle system so that there is a regular AIP bus stop." IAA § 4 ¶ a-f. The IAA concludes that: "AIP and

UMCP will seek to maximize the benefits to both sides through collaboration, joint projects, and good neighborly interaction." IAA § 5. Dr. Schmidt is seeking additional discovery regarding the relationship between UMCP and AIP and believes that additional evidence establishing entwinement might be obtained in subsequent discovery.

D. Breach of Contract

Maryland courts have recognized that contractual obligations can arise in the employment context even when such obligations are not embodied in a written contract. *See Gardiner v. Tschechtelin*, 765 F. Supp. 279, 285 (D. Md. 1991). In *Staggs v. Blue Cross of Maryland, Inc.*, former employees challenged their termination by the defendant employer, alleging a breach of employment contract. 486 A.2d 798, 799 (Md. Ct. Spec. App. 1985). The plaintiffs claimed they had a contract based upon a policy memorandum set forth by the defendant. *Id.* The court found that provisions in policy statements that "limit the employer's discretion to terminate an indefinite employment or that set forth a required procedure for termination of such employment may, if properly expressed and communicated to the employee, become contractual undertakings by the employer that are enforceable by the employee." *Id.* at 803-804. However, in order for management representations to be treated as contractual obligations, the representations must be definite and properly expressed. *See id.* at 803. "[G]eneral statements of policy" are not definite enough to create a contractual right. *Ferragamo v. Signet Bank/Maryland*, 1992 U.S. Dist. LEXIS 21602, at *12, *14 (D. Md. 1992).

In *Weir v. Litton Bionetics, Inc.*, 1986 U.S. Dist. LEXIS 24884 (D. Md. May 29, 1986), plaintiff alleged, *inter alia*, that the company's reduction in force policy created a contract that the employer breached when she was terminated. In denying both plaintiff's and defendant's cross-motions for summary judgment on this issue, the court decided that it was a question of fact as to "whether the employment policy in question was adequately set forth and whether it was communicated to the affected employees." *Id.* at *14.

In *Gardiner v. Tschechtelin*, 765 F. Supp. 279 (D. Md. 1991), the court found for plaintiff employees, faculty members of the Community College of Baltimore, when concluding that an

employment contract existed. Using a totality of the circumstances approach, based on both the employer's by-laws and a memorandum of understanding between the employer and the teachers' union, the court reasoned that the circumstances "suggest[ed] that the rights to tenure were of a contractual nature." *Id.* at 286. The court recognized that contractual obligations could arise "even when such obligations are not embodied in a written contract." *Id.* Further, the court reiterated that "contractual obligations can arise out of the employer's policy directives where the employee was aware of such policies." *Id.* Because the court found that the by-laws and memorandum, taken together, were sufficiently detailed and known by the faculty, an employment contract was determined to exist between the defendant employer and the teachers' union. *Id.*

Significantly, in response to AIP employees' demand for greater job security, and to address employees' fears that they might be penalized for expressing concerns about the workplace and AIP policies, AIP repeatedly and specifically promised employees that job security would be based on job performance and that speaking freely about workplace concerns would not jeopardize one's job. AIP repeatedly expressed this policy orally and in writing. Consequently, after receiving that promise, and in consideration for AIP's job security policy, Dr. Schmidt continued to work for the company. Despite the fact that AIP's promise regarding employee evaluation and employee freedom of expression became a term of Dr. Schmidt's employment with AIP, Dr. Schmidt was terminated for raising equal employment concerns and for reasons other than his job performance, thereby materially breaching its contract with Dr. Schmidt.

E. Detrimental Reliance

To state a claim for detrimental reliance under Maryland law, a plaintiff must show: (1) a clear and definite promise; (2) the promisor has a reasonable expectation that the offer will induce action or forbearance on the part of the promisee; (3) the offer or promise does induce actual and reasonable action or forbearance by the promisee; and (4) causes a detriment which can only be avoided by the enforcement of the promise. *See McDermott v. Nat'l Shipping Co. of Saudi Arabia*, 2001 U.S. App.

LEXIS 19983, at *3-4 (4th Cir. 2001) (citing *Pavel Enters., Inc. v. A.S. Johnson, Inc.*, 674 A.2d 521, 532 (Md. 1996)).

F. Breach of Implied Covenant of Good Faith and Fair Dealing

Maryland law recognizes an implied covenant of good faith and fair dealing in negotiated contracts. *Eastern Shores Mkts, Inc. v. J.D. Assoc.*, 213 F.3d 175, 182 (4th Cir. 2000) (citations omitted). Where a court finds an implied covenant of good faith and fair dealing to exist, the covenant does not obligate a party to take affirmative actions not mandated by the contract, but rather, the implied duty is simply "a recognition of conditions inherent in expressed promises." *See id.* at 182, 184.

For the reasons stated above, AIP's promise regarding employee evaluation and employee freedom of expression became a term of Dr. Schmidt's employment with AIP. Given this contractual employment relationship, AIP had a legal duty to perform under that contract in good faith. Its breach of the agreement by terminating Dr. Schmidt for raising equal employment concerns and for reasons other than his job performance is a violation of the implied covenant of good faith and fair dealing contained in that employment contract.

III. ASSESSMENT OF STRENGTHS AND WEAKNESSES

A. Section 1981 and Title VII

Because a *prima facie* case under Section 1981 and Title VII is almost identical, the claims have the same strengths and weaknesses and are assessed together below.

Dr. Schmidt believes that he can put forth a strong Section 1981 and Title VII claim and consequently, that AIP faces real exposure on both of these claims. Specifically, Dr. Schmidt's complaints regarding equal employment and AIP's discriminatory employment practices is a protected activity under both statutes. Dr. Schmidt can point to numerous retaliatory acts during his employment, including his termination. AIP will no doubt point to Dr. Schmidt's book and allege that his termination was justified because of his statement that he "stole" time from AIP to write the book. Although this will shift the burden back to Dr. Schmidt to prove that the stated reason for termination was a pretext,

Dr. Schmidt believes that there is, even at this stage of discovery, enough evidence to permit the trier of fact to conclude that AIP viewed Dr. Schmidt as a "trouble maker" for years and used the book as a pretext to terminate his employment. Significantly, AIP has not produced any documents relating to either the actual decision making process to terminate Dr. Schmidt or compliance (or non-compliance) with AIP's formal termination procedures despite a document request and counsel's subsequent requests for same. Nor have key individuals who participated in the retaliatory acts outlined above been deposed to date. Dr. Schmidt is confident that additional supporting evidence will buttress an already compelling retaliation claim under Section 1981 and Title VII.

B. Section 1983

Dr. Schmidt is cognizant of the high burden imposed by the state actor requirement of his Section 1983 claim. He believes that the Informal Affiliation Agreement ("IAA") between the University of Maryland and AIP is the foundation of a successful entwinement argument. Moreover, Dr. Schmidt has requested additional documents relating to the IAA and, more generally, the relationship between AIP and the University of Maryland. Dr. Schmidt may also seek third-party discovery that discloses more fully the relationship between AIP and the University. At present, Dr. Schmidt concedes that discovery is likely necessary to buttress this element of his Section 1983 claim and, given the early stage of discovery, it cannot be forecasted exactly what additional discovery will disclose about the nature of this relationship.

C. Breach of Contract, Breach of Implied Covenant of Good Faith and Fair Dealing and Detrimental Reliance

Dr. Schmidt believes that there is a substantial likelihood that a court would determine that a contractual employment relationship existed as a result of AIP's repeated and specific promises that employment would be conditioned on work performance and that employees were free to voice concerns freely in the workplace. Dr. Schmidt is cognizant of the high standard required for the finding of a contract to supplant the existence of an at will employment relationship. Despite this standard, Dr. Schmidt feels that there is significant exposure on the part of AIP under the facts developed thus far, and

that subsequent discovery would be likely only to buttress Dr. Schmidt's argument that an employment contract was created.

Dr. Schmidt's claim for breach of the implied covenant of good faith and fair dealing rises or falls on whether an employment contract is found to have been created. Maryland law does not recognize an independent action for breach of this implied warranty. Rather, such a claim is necessarily linked to the existence of an underlying contract. Thus, Dr. Schmidt feels that the strengths and weaknesses of his implied covenant claim are equal to those relating to his claim alleging breach of contract.

Finally, the strength of Dr. Schmidt's detrimental reliance claim rests, like his contract claim, on the definiteness and specificity of AIP's promise to permit free expression, condition employment on performance and on Dr. Schmidt's reliance thereon. As stated in relation to his contract claim, Dr. Schmidt believes that sufficient evidence exists that AIP made repeated and specific promises regarding his and other employees' ability to discuss workplace issues, including equal employment issues, without fear of retaliation. He also feels confident in his ability to establish justifiably reliance. Dr. Schmidt feels that subsequent discovery can only enhance his claim.

IV. DAMAGES

As a consequence of his retaliatory discharge, Dr. Schmidt is seeking reinstatement, compensatory damages, including back and front pay, and punitive damages. As stated with more particularity in Dr. Amy McCarthy's April 11, 2005 Report, Plaintiff seeks damages for total lost back and front pay in the amount of $816,188.00.[4] *See* McCarthy Report at Exh. 6. Dr. Schmidt seeks additional damages for emotional distress, mental anguish and pain and suffering caused by AIP's illegal retaliatory acts. Dr. Schmidt also seeks punitive damages. Although damages relating to emotional distress, mental anguish, pain and suffering and to his claim for punitive damages cannot be calculated

[4] Subsequent to Dr. McCarthy's April 11, 2005 Report, and during Dr. Schmidt's record search relating to his document production, Dr. Schmidt discovered records indicating that he had received unemployment benefits in the amount of $9,750.00. As these documents were not available at the time Dr. McCarthy drafted her report, they were not considered in her calculations. Thus, the damages stated above ($816,188.00) account for this additional mitigating income and reflect a subtraction of $9,750.00 from Dr. McCarthy's calculation of $825,938.00, as stated in her Report.

with precision, these amounts are ascertainable by a jury and represent damages sought over and above the $816,188.00 sought for total lost back and front pay. It is likely that a jury would value the unliquidated portion of his claim in excess of $1 million. Assuming an amount of $1,000,000 attributable to the unliquidated portion, this results in a total estimated claim value of $1,816,188.00.

V. SETTLEMENT OPTIONS

Dr. Schmidt is amenable to a wide variety of settlement options. Listed below are settlement options that, alone or in some combination, might present a satisfactory resolution of the litigation:

- Reinstatement
- Monetary compensation
- Verifiable guarantees by AIP to adopt equal employment practices or sponsorship by AIP of equal employment functions. Included in this category would be such actions as granting member society status to the National Society of Black Physicists, an organization that has, in the past, sought in vain to become a member society of AIP.
- An additional component of any settlement would be payment of reasonable attorneys fees for the legal work performed on Dr. Schmidt's behalf to date.

Dr. Schmidt remains open to additional settlement options. Plaintiff notes that the structure of the settlement would be impacted by exactly which of the foregoing options were offered. Dr. Schmidt understands that AIP is not interested in reinstating him to his former position as Senior Editor. Thus, for example, if reinstatement is not an available settlement alternative, the monetary compensation component of a settlement package would increase.

It bears noting that, from Dr. Schmidt's perspective, AIP has been unrealistically "low balling" Plaintiff when discussing a strictly monetary settlement. AIP has stated that it would be willing to settle the matter for approximately $20,000. From Plaintiff's perspective, this "offer" is so unrealistic as to be insulting, fails to consider the strength of Plaintiff's case or the damages suffered and ignores the substantial sums that will be expended in the event the case does not settle and ultimately proceeds to trial.

Prior to agreeing to mediation, counsel for AIP indicated her desire to mediate before any further discovery occurred. During these conversations, counsel for AIP acknowledged that even preliminary discovery – deposing Dr. Schmidt, defending two AIP depositions and a 30(b)(6) deposition of AIP – would likely cost AIP $40,000. This acknowledgement alone renders AIP's initial settlement overtures unrealistic. Should mediation fail, discovery alone, absent discovery disputes, would likely run well in excess of $100,000. Summary Judgment and ultimately, trial, will increase this amount many times over. And of course, if the trial results in a judgment in any amount for Dr. Schmidt, Defendant will be liable not only for its own very substantial attorneys fees, but (because of the fee-shifting statutes involved) those of Dr. Schmidt as well, in addition to payment of the judgment itself.